

mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.²³²

98. Section 214(e)(2) directs state commissions to designate as eligible telecommunications carriers those common carriers that meet the requirements of section 214(e)(1) for a service area designated by the state commission.²³³ When first passed into law in 1996, however, section 214(e) did not include a provision for designating carriers that were not subject to the jurisdiction of a state commission. Thus, common carriers not subject to state commission jurisdiction, "most notably, some carriers owned or controlled by native Americans," were unable to be designated as eligible telecommunications carriers.²³⁴ As a result, these carriers would have become ineligible for universal service support as of January 1, 1998, when the eligibility requirements of the Act became effective.²³⁵ In 1997, Congress amended the Act with the addition of section 214(e)(6) to correct this "oversight."²³⁶

99. Section 214(e)(6) authorizes the Commission, upon request, to designate as an eligible telecommunications carrier "a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission."²³⁷ Under section 214(e)(6), the Commission may, with respect to an area served by a rural telephone company, and shall, in all other cases, designate more than one common carrier as an eligible telecommunications carrier for a designated service area, so long as the requesting carrier meets the requirements of section 214(e)(1).²³⁸ This designation must be made consistent with the public interest, convenience, and necessity. On December 29, 1997, the Commission released a Public Notice establishing the procedures that carriers must use when seeking Commission designation as an eligible telecommunications carrier pursuant to

²³² 47 U.S.C. § 214(e)(1).

²³³ 47 U.S.C. § 214(e)(2).

²³⁴ 143 Cong. Rec. H10807 (daily ed. Nov. 13, 1997) (statement of Rep. Bliley).

²³⁵ 143 Cong. Rec. H10807 (daily ed. Nov. 13, 1997) (statement of Representative Bliley). Pursuant to section 254(e) of the Act, 47 U.S.C. § 254(e), after the date on which the Commission's regulations implementing section 254 take effect, "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." Section 54.201 of the Commission's rules, 47 C.F.R. § 54.201, provides that beginning January 1, 1998 only an eligible telecommunications carrier shall be eligible to receive universal service support.

²³⁶ 143 Cong. Rec. S12568 (daily ed. Nov. 13, 1997) (statement of Sen. McCain).

²³⁷ 47 U.S.C. § 214(e)(6).

²³⁸ 47 U.S.C. § 214(e)(6). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission must find that the designation is in the public interest.

section 214(e)(6).²³⁹

100. Soon after the adoption of section 214(e)(6), the Common Carrier Bureau designated as eligible telecommunications carriers several tribally-owned carriers providing service on their respective tribal lands within the state of Arizona.²⁴⁰ As a result of these designations, these carriers continued to be eligible to receive federal universal service support and no local rate increases were necessary to replace support for which they otherwise might have become ineligible. The Bureau made these designations based on the carriers' representations that they were not subject to state commission jurisdiction, and the absence of any evidence to the contrary.

2. Further Notice

101. In the *Further Notice*, we tentatively concluded that, by adding section 214(e)(6), Congress sought to ensure that carriers serving all regions of the United States have access to a mechanism that will allow them to be designated as eligible telecommunications carriers, if they meet the statutory requirements.²⁴¹ We stated that, "[r]ecognizing that the designation of eligible telecommunications carriers is primarily a state commission function, Congress granted this Commission the authority for this task in the event that a carrier is not subject to the jurisdiction of a state commission."²⁴² To that end, we sought comment on how section 214(e)(6) should be interpreted and implemented to determine whether a carrier is subject to the jurisdiction of a state commission.²⁴³ We opined that the statutory language of section 214(e)(6) is ambiguous with respect to when the

²³⁹ *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, FCC 97-419 (rel. Dec. 29, 1997) (*Section 214(e)(6) Public Notice*). The Commission instructed carriers seeking designation to, among other things, set forth the following information in a petition: (1) a certification and brief statement of supporting facts demonstrating that the petitioner is "not subject to the jurisdiction of a state commission;" (2) a certification that the petitioner offers all services designated for support by the Commission pursuant to section 254(c); (3) a certification that the petitioner offers the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services;" (4) a description of how the petitioner "advertise[s] the availability of the [supported] services and the charges therefor using media of general distribution." In addition, if the petitioner meets the definition of a "rural telephone company" pursuant to section 3(37) of the Act, the petitioner must identify its study area. If the petitioner is not a rural telephone company, the petitioner must include a detailed description of the geographic service area for which it requests a designation of eligibility from the Commission. *Id.*

²⁴⁰ See *Designation of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O'odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, AAD/USB File No. 98-28, DA 98-392 (rel. Feb. 27, 1998). See also *Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, CC Docket No. 96-45, DA 98-2237 (rel. Nov. 4, 1998). These petitions were placed on public notice by the Bureau. The Arizona Corporation Commission was notified by Commission staff regarding the petitions for designation. The Arizona Commission did not submit comments in response to the petitions, nor did it otherwise express any objection to the Commission's designation.

²⁴¹ *Further Notice*, 14 FCC Rcd at 21210, para. 75.

²⁴² *Further Notice*, 14 FCC Rcd at 21210, para. 75.

²⁴³ *Further Notice*, 14 FCC Rcd at 21211, para. 76.

Commission's authority to designate an eligible telecommunications carrier is triggered.²⁴⁴ We tentatively concluded that the determination whether a carrier is subject to the jurisdiction of a state commission may depend on the nature of the service provided (*e.g.*, wireline, satellite, or wireless) or the geographic area in which the service is provided (*e.g.*, tribal land).²⁴⁵

102. Against the backdrop of this tentative conclusion, and out for respect for tribal sovereignty, we sought comment on the extent of state commission jurisdiction over tribally-owned and non-tribally-owned carriers providing service on tribal lands. We noted that, with regard to tribally-owned carriers providing service on tribal lands, state law is generally inapplicable when state commissions attempt to regulate the conduct of tribal members directly within the reservation boundaries, except in "exceptional circumstances."²⁴⁶ We also noted that, with regard to a state commission's authority to regulate a non-tribal carrier seeking to provide service on tribal lands, the appropriateness of the state commission's exercise of authority turns on a balancing of federal and tribal interests against the interest of the state. This analysis must be made in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal of encouraging tribal self-sufficiency and economic development."²⁴⁷ We recognized that this inquiry is a particularized one, and thus, specific to each state and the circumstances surrounding the provision of telecommunications services by non-tribal members within those tribal lands.²⁴⁸ Finally, we recognized, as did Congress when it enacted section 214(e)(6), that some state commissions have asserted jurisdiction over carriers seeking to provide service on tribal lands, and that these commissions regulate certain aspects of a carrier's provision of service on tribal lands.²⁴⁹ Thus, we acknowledged that the exercise of state commission jurisdiction over carriers providing service on tribal lands varies from state to state.

103. In the *Further Notice*, we recognized that the fact-intensive and legally complex determination of whether a particular state commission has jurisdiction over a particular carrier serving tribal lands may lead to confusion, duplication of efforts, and needless controversy among carriers, tribal authorities, state commissions, and this Commission. This, in turn, might undermine the universal service goal of ensuring that all Americans, including those living on tribal lands, have access to affordable telecommunications services.²⁵⁰ Accordingly, we proposed a process for Commission designation of eligible telecommunications carriers under section 214(e)(6) for carriers serving tribal lands. This process was designed to facilitate the designation of carriers serving tribal lands in a manner that recognizes the sovereign nature of the tribal authorities. We tentatively concluded that, before asking this Commission to make the designation under section 214(e)(6), a carrier should consult with

²⁴⁴ *Further Notice*, 14 FCC Rcd at 21211, para. 78.

²⁴⁵ *Further Notice*, 14 FCC Rcd at 21211-12, para. 78.

²⁴⁶ *Further Notice*, 14 FCC Rcd at 21212, para. 79.

²⁴⁷ *Further Notice*, 14 FCC Rcd at 21212, para. 80.

²⁴⁸ *Further Notice*, 14 FCC Rcd at 21212-13, para. 80.

²⁴⁹ *Further Notice*, 14 FCC Rcd at 21213, para. 81.

²⁵⁰ *Further Notice* 14 FCC Rcd at 21213, para. 82.

the relevant tribal authority and/or the state commission on whether the state commission has jurisdiction to designate the carrier.²⁵¹ In situations where the tribal authority and the state commission agree that the state commission has jurisdiction, we tentatively concluded that the state commission would conduct the designation pursuant to section 214(e)(2).²⁵² In instances where the tribal authority challenges the state commission's exercise of jurisdiction, we encouraged carriers, with the support of the tribal authority, to apply to this Commission for designation.²⁵³ Finally, we sought comment on whether the Commission, rather than the state commission, should have exclusive jurisdiction to designate terrestrial wireless or satellite carriers as eligible telecommunications carriers.²⁵⁴

C. Discussion

1. Scope of Section 214(e)(6)

104. State Commission Designation of Eligible Telecommunications Carriers. In light of the statutory framework and legislative history, we conclude that Congress, in enacting section 214(e)(6), did not intend to alter the basic framework of section 214(e), which gives the state commissions the principal role in designating eligible telecommunications carriers under section 214(e)(2). This interpretation of section 214(e) is consistent with the legislative history, which indicates that section 214(e)(6) is not intended to "restrict or expand the existing jurisdiction of State commissions over any common carrier," but is intended to provide a means for the designation of a carrier over which a state commission lacks jurisdiction.²⁵⁵

105. We conclude that section 214(e)(6) requires the Commission to conduct a designation proceeding in instances where the relevant state commission lacks, for whatever reason, the authority to perform the designation. We are guided by the statutory framework, legislative history, and the record before us, to conclude that the threshold question in determining whether the Commission may exercise its authority under section 214(e)(6) is whether the state commission lacks jurisdiction over the carrier, for any reason. We agree with commenters who suggest that the inquiry should include, but not be limited to, whether a state commission lacks jurisdiction over the particular service or geographic area.²⁵⁶ The determination as to whether a state commission lacks jurisdiction over a particular carrier is a fact-specific inquiry that may depend on interpretations of federal, state, and tribal law where appropriate.

²⁵¹ *Further Notice* 14 FCC Rcd at 21213, para. 82.

²⁵² *Further Notice*, 14 FCC Rcd at 21213, para. 82.

²⁵³ *Further Notice*, 14 FCC Rcd at 21213, para. 82.

²⁵⁴ *Further Notice*, 14 FCC Rcd at 21211, para. 77.

²⁵⁵ 143 Cong. Rec. H10807-09 (dail ed. Nov. 13, 1997) (statement of Rep. Bliley).

²⁵⁶ See, e.g., BAM comments at 11 (contending that section 214(e)(6) "applies whenever the state has no jurisdiction for whatever reason"); NTIA *ex parte* comments at 15 ("the amendment addresses a relatively limited number of instances in which, for one reason or another, the relevant State commission lacks jurisdiction over a particular carrier..."). See also CenturyTel comments at 8 ("Congress did not intend to replace state authority to grant [eligible telecommunications carrier] status, but rather to fill a void where states lack such authority under existing state law.").

106. *Jurisdiction Over Carriers Serving Tribal Lands.* We are not persuaded by claims that the exercise of our authority under section 214(e)(6) is limited to designations of eligibility sought by tribally-owned carriers serving tribal lands.²⁵⁷ We conclude that neither the language of section 214(e)(6) nor its legislative history provides any indication that it applies only to tribally-owned carriers serving tribal lands.²⁵⁸ Section 214(e)(6) applies to any carrier “not subject to the jurisdiction of a state commission.” Moreover, the legislative history supports this interpretation.²⁵⁹ In sum, we agree with those commenters who contend that the legislative history of section 214(e)(6) makes clear that, although the class of carriers to be covered by section 214(e)(6) was dominated by tribally-owned carriers, it was not restricted to them.²⁶⁰

107. Nor do we find persuasive claims that the Commission generally has authority to make all eligible telecommunications carrier determinations over carriers providing telecommunications service on tribal lands.²⁶¹ We do not believe that Congress intended the Commission to use section 214(e)(6) to usurp the role of a state commission that has jurisdiction over a carrier providing service on tribal lands.²⁶² On the contrary, in adopting section 214(e)(6), Congress recognized that some state commissions had asserted jurisdiction over tribal lands.²⁶³ Congress also acknowledged pending jurisdictional disputes between states and tribes and made clear that the adoption of section 214(e)(6) was not “intended to impact litigation regarding jurisdiction between State and federally-recognized tribal entities.”²⁶⁴

²⁵⁷ See, e.g., Western Alliance comments at 3-7; NRTA & OPASTCO reply comments at 11-12.

²⁵⁸ Accord NTIA *ex parte* comments at 13.

²⁵⁹ For example, according to Senator McCain, the author of section 214(e)(6), the amendment was necessary because, as enacted in 1996, “Section 214(e) [did] not account for the fact that State commissions in a few States have no jurisdiction over certain carriers. Typically States *also* have no jurisdiction over tribally-owned common carriers which may or may not be regulated by a tribal authority that is not a State Commission per se.” 143 Cong. Rec. S12568 (daily ed. Nov. 13, 1997) (emphasis added). This intention was shared by the proponents of the amendment in the House of Representatives who noted that “some common carriers providing service today are not subject to the jurisdiction of a State commission; *most notably* some carriers owned or controlled by native Americans.” *Id.* at H10807 (daily ed. November 13, 1997) (statement of Rep. Bliley) (emphasis added). See also *id.* at H10808 (statement of Rep. Markey) (bill allows Commission to designate as an eligible telecommunications carrier a “common carrier that is not subject to the jurisdiction of a State commission, *including* those telephone companies owned by certain federally-recognized Indian tribes”) (emphasis added); *id.* at H10808 statement of Rep. Hayworth) (existing section 214(e) “has created a serious problem for certain telecom carriers, *particularly* some Indian tribes”) (emphasis added).

²⁶⁰ See, e.g., NTIA *ex parte* comments at 13; BAM comments at 11; Western Wireless reply comments at 15-16.

²⁶¹ See, e.g., BAM comments at 10; Western Wireless comments at 5-7.

²⁶² *Cf.*, SBI comments at 5; USCC reply comments at 6-7.

²⁶³ See 143 Cong. Rec. H10808 (daily ed. Nov. 13, 1997) (statement of Rep. Hayworth) (“Some, not all, but some States have no jurisdiction over tribally-owned carriers.”).

²⁶⁴ See Colloquy between Representatives Thune and Bliley, 143 Cong. Rec. H10808-09 (daily ed. Nov. 13, 1997).

108. As discussed above, the Commission's authority under section 214(e)(6) applies only when a carrier is not subject to the jurisdiction of a state commission. The determination as to whether a carrier providing service on tribal lands is subject to the jurisdiction of a state commission is a complicated and intensely fact-specific legal inquiry informed by principles of tribal sovereignty and requiring the interpretation of treaties, and federal Indian law and state law. Such determinations usually consider whether state regulation is preempted by federal regulation, whether state regulation is consistent with tribal sovereignty and self-determination, and whether the tribe has consented to state jurisdiction, either in treaties or otherwise.²⁶⁵ The inquiry as to whether a state commission has authority to regulate the provision of telecommunications service on tribal lands is a particularized one, and thus specific to each state and the facts and circumstances surrounding the provision of the service.²⁶⁶ As the U.S. Supreme Court has stated, "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members."²⁶⁷

109. Jurisdiction Over Particular Services. We further conclude that the technology used to provide the telecommunications service does not *per se* determine whether the state commission or this Commission has jurisdiction over the carrier for purposes of designating the carrier as eligible to receive federal universal service support. Specifically, we conclude that the provision of service by terrestrial wireless or satellite carrier does not *per se* place the carrier outside the parameters of the state commission designation authority under section 214(e)(2). We believe that if Congress had intended to exempt particular services from the state commission designation process, it would have expressly done so in section 214(e). We therefore agree with NTIA that there is nothing in the statute or the legislative history to support the notion that, by enacting section 214(e)(6), Congress intended to remove from the state commissions the primary responsibility for designating wireless or satellite carriers as eligible telecommunications carriers.²⁶⁸

110. We further conclude that state commission designation of a Commercial Mobile Radio Service (CMRS) provider pursuant to section 214(e)(2) does not constitute entry regulation in violation of section 332(c)(3) of the Act.²⁶⁹ Section 332(c)(3) bars state and local rate and entry regulation of CMRS providers, but allows the states to regulate "other terms and conditions of service." Section 332(c)(3) prohibits direct state regulation of entry by CMRS providers (e.g., a regulation that requires the CMRS provider to obtain a certificate of public convenience and necessity from the state prior to providing service), but a regulation does not necessarily run afoul of section 332(c)(3) solely because it

²⁶⁵ See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Montana v. United States*, 450 U.S. 544 (1981); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

²⁶⁶ *Further Notice*, 14 FCC Rcd at 21212, para. 80. The U.S. Supreme Court has cautioned that "[g]eneralizations on this subject have become . . . treacherous." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

²⁶⁷ *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142.

²⁶⁸ NTIA *ex parte* comments at 14.

²⁶⁹ 47 U.S.C. § 332(c)(3), "[n]otwithstanding section 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." *C.f.*, BAM comments at 13.

may make it more difficult for some carriers to offer service.²⁷⁰ We conclude that the prohibition on “entry” regulation in section 332(c)(3) does not prohibit states from designating CMRS providers as eligible telecommunications carriers because such designation relates to a carrier’s right to receive federal universal service support, rather than a carrier’s legal right to do business in a state. We need not decide for present purposes whether, or under what conditions, a particular state’s eligible telecommunications carrier designation process as applied to a CMRS provider might constitute impermissible entry regulation, rather than permissible regulation of terms and conditions of service. Moreover, this conclusion does not affect our ability to determine whether a state commission’s designation process or denial of eligibility may constitute a barrier to entry under section 253 of the Act.²⁷¹

111. We note that several states have already issued orders addressing designation requests from wireless carriers.²⁷² We encourage states to move forward expeditiously to resolve pending requests in a pro-competitive manner designed to preserve and advance universal service.

2. Section 214(e)(6) Designation Process for Carriers Serving Non-Tribal Lands

112. As discussed above, the threshold question for determining whether the Commission may exercise its authority to designate a carrier as an eligible telecommunications carrier under section 214(e)(6) is whether the state commission lacks jurisdiction over the carrier, for any reason. Section 214(e) does not, however, define the circumstances under which a state commission may lack jurisdiction, nor does it address whether such jurisdictional determinations should be made by the state commission or this Commission. We conclude that carriers seeking designation from this Commission under section 214(e)(6) for service provided on non-tribal lands must first consult with the relevant state regulatory commission on the issue of whether the state commission has jurisdiction to designate the carrier, even if the carrier asserts that the state commission lacks jurisdiction over the carrier.²⁷³ In so doing, we note that jurisdictional challenges relating to the authority of the state commission to designate certain carriers or classes of carriers on non-tribal lands derive almost exclusively from interpretations of

²⁷⁰ See *Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, File No. WTB/POL 96-2, 13 FCC Rcd. 1735, 1746 (1997) (holding that requirement that CMRS providers contribute to state universal service fund does not constitute entry regulation within the meaning of section 332(c)(3)), *aff’d sub nom. CTIA v. FCC*, 168 F.3d 1332 (D.C.Cir. 1999).

²⁷¹ 47 U.S.C. §253.

²⁷² See, e.g., Arkansas Public Service Commission, *In the Matter of Determining Eligible Telecommunications Carriers in Arkansas*, Order, Docket No. 97-326-U (November 7, 1997); Public Service Commission of Wisconsin, *In the Matter of Designation of Eligible Telecommunications Carriers Under Part 54 of Title 47 of the Code of Federal Regulations*, Findings of Fact, Conclusions of Law and Final Order (December 23, 1997); Washington Utilities and Transportation Commission, *Order Designating Eligible Telecommunications Carriers, United States Cellular Corporation, et. al.*, (December 23, 1997).

²⁷³ As discussed in greater detail in Section IV.C.3., *infra.*, we establish a separate framework for carriers seeking a designation of eligibility pursuant to section 214(e)(6) for service provided on tribal lands.

state law.²⁷⁴

113. While a carrier may believe state law to preclude the state commission from exercising jurisdiction over the carrier for purposes of designation under section 214(e)(2), we conclude, as a matter of federal-state comity, that the carrier should first consult with the state commission to give the state commission an opportunity to interpret state law. We conclude that state commissions should be allowed a specific opportunity to address and resolve issues involving a state commission's authority under state law to regulate certain carriers or classes of carriers.²⁷⁵ Only in those instances where a carrier provides the Commission with an affirmative statement from a court of competent jurisdiction or the state commission that it lacks jurisdiction to perform the designation will we consider section 214(e)(6) designation requests from carriers serving non-tribal lands. We conclude that an "affirmative statement" of the state commission may consist of any duly authorized letter, comment, or state commission order indicating that it lacks jurisdiction to perform designations over a particular carrier. Each carrier should consult with the state commission to receive such a notification, rather than relying on notifications that may have been provided to similarly situated carriers.

114. We are concerned, however, that excessive delay in the designation of competing providers may hinder the development of competition and the availability of service in many high-cost areas.²⁷⁶ We believe it is unreasonable to expect prospective entrants to enter a high-cost market and provide service in competition with an incumbent carrier that is receiving support, without knowing whether they are eligible to receive support. If new entrants do not have the same opportunity to receive universal service support as the incumbent, such carriers may be unable to provide service and compete with the incumbent in high-cost areas.²⁷⁷ As the Commission has previously concluded, competitively

²⁷⁴ For example, Cellco and Western Wireless have filed petitions asserting that state law precludes the state commissions in Delaware, Maryland, and Wyoming from making the eligible telecommunications carrier designations for wireless carriers in those states. See *Western Wireless Petition For Designation as an Eligible telecommunications carrier in the State of Wyoming*, September 29, 1999 (Wyoming Petition); *Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, September 8, 1999 (contending that state law precludes the designation of CMRS carriers by the Delaware Public Service Commission and the Maryland State Public Service Commission) (Cellco Petition). Western Wireless' request for eligible telecommunications carrier designation was dismissed by the Wyoming Public Service Commission (Wyoming Commission) on the grounds that the Wyoming Telecommunications Act (Wyoming Act) denies the Wyoming Commission the authority for regulating "telecommunications services using . . . cellular technology," except for quality of service. As discussed *supra* in Section IV.C.1., we reject commenters' claims that state commission designation of CMRS carriers violates the prohibition against state entry and rate regulation under section 332(c) of the Act.

²⁷⁵ See, e.g., *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); Letter from Susan Stevens Miller, Maryland Public Service Commission, to Magalie R. Salas, FCC, dated April 18, 2000 (Maryland Commission *ex parte* comments). "Only after a State commission finds that it lacks the jurisdiction necessary should the CMRS provider file with the FCC. The State commission, not the FCC, should be responsible for determining its jurisdiction under state law." *Id.* at 2.

²⁷⁶ See Letter from Competitive Universal Service Coalition, to Chairman William Kennard, FCC, dated March 8, 2000 at 2 (indicating that some state commissions have delayed consideration of eligibility designation applications by a year and a half).

²⁷⁷ The Commission has recognized the importance of competitively neutral support mechanisms between competitive entrants and incumbent carriers in promoting competition and the provision of service in high-cost areas. *Universal Service Order*, 12 FCC Rcd at 8932, para. 287.

neutral access to such support is critical to ensuring that all Americans, including those that live in high-cost areas, have access to affordable telecommunications services.²⁷⁸ We are therefore concerned that indefinite delays in the designation process will thwart the intent of Congress, in section 254, to promote competition and universal service to high-cost areas. Accordingly, we commit to resolve, within six months of the date filed at the Commission, all designation requests for non-tribal lands that are properly before us pursuant to section 214(e)(6). We also strongly encourage state commissions to resolve designation requests filed under section 214(e)(2) in the same time frame.²⁷⁹

3. Section 214(e)(6) Designation Process for Carriers Serving Tribal Lands

115. In this section, we establish a framework designed to streamline the process for eligibility designation of carriers providing service on tribal lands. As discussed in greater detail below, we conclude that carriers seeking eligibility designations for service provided on tribal lands may petition this Commission under section 214(e)(6) for a determination of whether the carrier is subject to the state commission's jurisdiction and, in instances where the state lacks jurisdiction, a decision on the merits of the designation request. Under this framework, a carrier seeking an eligibility designation for service provided on tribal lands will avoid any costs and delays associated with resolving the threshold jurisdictional determination in a state designation proceeding and possible court appeal of that state jurisdictional decision. Moreover, this framework will provide a safe harbor for carriers unwilling to have the jurisdictional question resolved by a state commission. This streamlined designation process for carriers serving tribal lands is intended to facilitate the expeditious resolution of such requests so as to increase the availability of affordable telecommunications services to tribal lands, while preserving the state commissions' jurisdiction consistent with federal, tribal, and state law. We believe that this process will balance carefully the principles of tribal sovereignty and the demonstrated need for access to affordable telecommunications services on tribal lands, against the appropriate exercise of state jurisdiction over carriers operating on such lands.

116. As discussed in Section IV.C.1. above, we conclude that section 214(e)(6) directs the Commission to perform the eligibility designation in instances where the carrier is not subject to the jurisdiction of a state commission. Neither section 214(e)(2) nor section 214(e)(6), however, address how such jurisdictional determinations should be made or by which commission. In the absence of specific guidance in the statute as to how such jurisdictional determinations should be made, we conclude that this Commission may resolve the threshold question of whether a carrier seeking eligibility designation for service provided on tribal lands is subject to the jurisdiction of the state commission. This conclusion is consistent with the execution of our duty to preserve and advance universal service under section 254, principles of tribal sovereignty, and the unique federal trust relationship between Indians tribes and the federal government.

117. We recognize that a determination as to whether a state commission lacks jurisdiction over a carrier providing service on tribal lands is a legally complex inquiry extending beyond

²⁷⁸ *Universal Service Order*, 12 FCC Rcd at 8801, para. 48 ("an explicit recognition of competitive neutrality in the collection and distribution of funds and determination of *eligibility* in universal service support mechanisms is consistent with congressional intent and necessary to promote a pro-competitive, de-regulatory national policy framework.") (emphasis added).

²⁷⁹ In the attached Further Notice of Proposed Rulemaking, Section V., *infra*, we seek comment on whether to adopt a rule that would require all requests for designation under section 214(e), whether filed with this Commission or a state commission, to be resolved within six months of the filing date, or some shorter period.

interpretations of state law to principles of tribal sovereignty, federal Indian law, and treaties.²⁸⁰ Evaluating the extent to which a state commission has jurisdiction over activities conducted on tribal lands, whether by members or non-members of a tribe, will involve questions of whether state regulation is preempted by federal regulation, whether state regulation is consistent with tribal sovereignty and self-determination, and whether a tribe has consented to state jurisdiction in treaties or otherwise. Thus, we find that such jurisdictional determinations, which will involve an analysis of principles of tribal sovereignty, federal Indian law, treaties, and state law, may be appropriately performed by this Commission.

118. The jurisdictional ambiguities associated with the question of whether a state may designate a carrier serving tribal lands may unnecessarily delay the provision of affordable services in high-cost areas. We intend this framework to facilitate the designation of carriers eligible to receive federal universal service support for service provided on tribal lands by permitting such carriers to seek resolution of the jurisdictional issue directly from this Commission. Absent this framework, the designation of such carriers as eligible to receive federal universal service support may be otherwise unnecessarily delayed pending resolution of the jurisdictional question, or potentially prevented entirely in those instances where the tribal authority will not support the carrier's submission to state commission jurisdiction.

119. Moreover, in establishing this framework for the designation of eligible telecommunications carriers serving tribal lands, we are guided by our recognition of, and respect for, principles of tribal sovereignty and self-determination. As described in the Commission's *Indian Policy Statement*, we acknowledge the principles of tribal sovereignty and self-government and the unique trust relationship between the Indian tribes and the federal government.²⁸¹ We are mindful that the federal trust doctrine imposes on federal agencies a fiduciary duty to conduct their authority in matters affecting Indian tribes in a manner that protects the interest of the tribes.²⁸² We are also mindful that federal rules and policies should therefore be interpreted in a manner that comports with tribal sovereignty and the federal policy of empowering tribal independence.²⁸³

120. In light of our obligation to preserve and advance universal service under section 254, principles of tribal sovereignty and self-determination, and our unique federal trust responsibility, we adopt the following framework for resolution of designation requests under section 214(e)(6) for carriers serving tribal lands. We conclude that a carrier seeking a designation of eligibility to receive federal universal service support for telecommunications service provided on tribal lands may petition the Commission for designation under section 214(e)(6), without first seeking designation from the appropriate state commission. The petitioner must set forth in its petition the basis for its assertion that it is not subject to the state commission's jurisdiction, and bears the burden of proving that assertion. The

²⁸⁰ See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136; *Montana v. United States*, 450 U.S. 544; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202.

²⁸¹ See *Indian Policy Statement*.

²⁸² See, e.g., *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

²⁸³ See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143-44; *Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982).

petitioner must provide copies of its petition to the appropriate state commission at the time of filing with the Commission. The Commission will release, and publish in the Federal Register, a public notice establishing a pleading cycle for comments on the petition. The Commission will also send the public notice announcing the comment and reply dates to the affected state commission by overnight express mail to ensure that the state commission is notified of the notice and comment period.

121. Based on the evidence presented in the record, the Commission shall make a determination as to whether the carrier has sufficiently demonstrated that it is not subject to the state commission's jurisdiction. In the event the Commission determines that the state commission lacks jurisdiction to make the designation and the petition is properly before the Commission under section 214(e)(6), the Commission will decide the merits of the request within six months of release of an order resolving the jurisdictional issue. If the carrier fails to meet its burden of proof that it is not subject to the state commission's jurisdiction, the Commission will dismiss the request and direct the carrier to seek designation from the appropriate state commission. In such cases, we urge state commissions to act within a similar time frame (*i.e.*, six months) to resolve such requests as expeditiously as possible.

122. We emphasize that a carrier seeking a section 214(e)(6) designation for service provided on tribal lands must bear the burden of demonstrating that it is not subject to the state commission's jurisdiction. As discussed above, we reject the contention that section 214(e)(6) provides the Commission with the blanket authority to make all eligible telecommunications carrier designations over carriers providing service on tribal lands.²⁸⁴ In so doing, we recognize that the issue of whether a state commission may exercise jurisdiction over a carrier providing service on tribal lands is a particularized inquiry guided by principles of tribal sovereignty, federal Indian law, and treaties, as well as state law. Therefore, carriers seeking an eligibility designation from this Commission for the provision of service on tribal lands should provide fact-specific support demonstrating that the carrier is not subject to the state commission's jurisdiction for the provision of service on tribal lands. Such support should include any relevant case law, statutes, and treaties. We emphasize that this is a strict burden and that generalized assertions regarding the state commission's lack of jurisdiction will not suffice to confer jurisdiction on this Commission under section 214(e)(6). We would also find informative any statements and analyses the tribal authority might provide regarding the petitioner's request for designation and the state commission's exercise of jurisdiction. For example, carriers may include with their petitions a letter from the appropriate tribal authority addressing the jurisdictional question or the merits of the designation request.

123. We decline to place on the affected state commission the burden of proving that it has jurisdiction over a particular carrier.²⁸⁵ To do so would suggest that state commission bear the burden of overcoming a general presumption that states do not have jurisdiction over carriers providing service on tribal lands. Such a presumption is inconsistent with our determination that the issue of whether a state commission lacks jurisdiction over a carrier providing service on tribal lands is a particularized inquiry, and thus specific to each state and the facts and circumstances surrounding the provision of the service.²⁸⁶

²⁸⁴ See paras. 107-108, *infra*.

²⁸⁵ See, e.g., Salt River/NTTA comments at 17-18; Western Wireless reply comments at 17.

²⁸⁶ See para. 108, *infra*.

124. We strongly encourage the participation of the affected state commissions and tribal authorities in this process. The determination of whether a particular carrier is subject to the state commission's jurisdiction for service provided on tribal lands is one that will be greatly informed by the participation of the tribes and state commission or other state officials. Based on our experience to date with section 214(e)(6), we believe that there will be some state commissions that will not object to the Commission's designation of carriers serving tribal lands as eligible to receive federal universal service support.²⁸⁷ We look forward to working with the state commissions, tribal authorities, and members of industry to resolve these jurisdictional questions, and ultimately the designation requests, in an expeditious manner. To that end, we seek comment in the attached Further Notice of Proposed Rulemaking on additional measures that may be implemented to further facilitate the designation process for the provision of service on tribal lands.²⁸⁸

125. We emphasize, however, that this process is limited in several respects. First, a carrier may avail itself of this process only to seek a designation of eligibility to receive federal universal service support for service provided on *tribal lands*.²⁸⁹ Petitioners seeking an eligibility designation under section 214(e)(6) for service provided on tribal lands must accurately describe the specific geographic areas they wish to serve, and must demonstrate that such areas satisfy the definition of tribal lands we adopt in this Order. As discussed above in Section III.C.1., the federal government has a unique trust responsibility with respect to members of federally-recognized tribes. In addition, the determination of jurisdiction over a carrier serving tribal lands is an inquiry that will extend beyond questions of state law, and will be informed by principles of tribal sovereignty, federal law, and treaties.²⁹⁰ Thus, it is appropriate and reasonable that the Commission, in executing its statutory obligation to preserve and advance universal service, should determine whether a carrier seeking an eligibility designation for services provided on tribal lands is subject to the state commission's jurisdiction.

126. Second, a carrier may only avail itself of this process when it has not initiated a

²⁸⁷ See, e.g., *Designation of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O'odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, DA 98-392 (rel. Feb. 27, 1998). See also *Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, CC Docket No. 96-45, DA 98-2237 (rel. Nov. 4, 1998). These petitions were placed on public notice by the Bureau. The Arizona Corporation Commission was notified by Commission staff regarding the petitions for designation noted above. The Arizona Commission did not submit comments in response to the petitions, nor did it otherwise express any objection to the Commission's designation.

²⁸⁸ See *infra* Section V.

²⁸⁹ For purposes of this section, we define "tribal lands" consistent with the definition adopted in the context of our actions relating to Lifeline and Link Up in Section III of this Order. Specifically, for purposes of identifying the geographic areas for which we will make the jurisdictional determination described in Section IV.C.3, we define "tribal lands" to include the definitions of "reservation" and "near reservation," as those terms are defined under BIA's regulations. See 25 C.F.R. §§ 20.1(v) and 20.1(r); see *supra* Section III.B.2..

²⁹⁰ See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136; *Montana v. United States*, 450 U.S. 544; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202.

designation proceeding before the affected state commission. In order to avoid the potential for "forum-shopping" and the costs and confusion caused by a duplication of efforts between this Commission and state commissions, we will not make a jurisdictional determination under section 214(e)(6) if the affected state commission has initiated a proceeding in response to a designation request under section 214(e)(2). Nothing we adopt today affects the ability of a state commission to make an eligible telecommunications carrier designation for a carrier serving tribal lands, where jurisdiction may otherwise be in dispute among the parties.

127. Finally, any determination made by this Commission pursuant to section 214(e)(6) relates only to a carrier's eligibility to receive *federal* universal service support for the provision of service on tribal lands. We emphasize that the Commission's determination of whether a particular carrier is subject to the state commission's jurisdiction for service provided on tribal lands is limited to the state commission's ability to designate the carrier as eligible to receive federal universal service support.

D. Pending Requests For Designation Pursuant To Section 214(e)(6)

1. Cellco Petition For Designation As An Eligible Telecommunications Carrier For Maryland and Delaware

128. *Background.* On September 8, 1999, Cellco Partnership d/b/a Bell Atlantic Mobile, a non-tribally-owned CMRS provider, filed with the Commission a petition seeking a designation of eligibility to receive federal universal service support for service provided in Delaware and parts of Maryland.²⁹¹ Cellco contends that provisions of applicable state law in Maryland and Delaware preclude state commission designation of wireless carriers under section 214(e)(2).²⁹² Specifically, Cellco contends that the state legislatures in both Delaware and Maryland have divested their respective state regulatory commissions of jurisdiction over cellular telephone service.²⁹³ On November 16, 1999, the Common Carrier Bureau sought comment on Cellco's petition for designation as an eligible telecommunications carrier under section 214(e)(6).²⁹⁴ The Maryland Public Service Commission (Maryland Commission) filed an *ex parte* letter requesting that the Commission dismiss Cellco's petition and direct Cellco to file its petition for eligible telecommunications carrier designation with the Maryland Commission.²⁹⁵ The Delaware Public Service Commission (Delaware Commission), however, filed comments confirming that it does not believe it has jurisdiction over CMRS providers.²⁹⁶

²⁹¹ *Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, September 8, 1999 (Cellco Petition).

²⁹² Cellco Petition at 3, 6-8 *citing* Md. Ann. Code, Public Utility Companies Article, §§ 2-112, 1-101(p), 1-101(bb); 26 Del. Ann. Code §§ 102(2), 202(c).

²⁹³ Cellco Petition at 3.

²⁹⁴ *Petition of Cellco Partnership D/B/A Bell Atlantic Mobile for Designation as an Eligible Telecommunications Carrier*, Public Notice, CC Docket No. 96-45, DA 99-2544 (rel. Nov. 16, 1999).

²⁹⁵ Maryland Commission *ex parte* comments at 1-2.

²⁹⁶ Delaware Commission Cellco Petition comments at 2.

129. *Discussion.* Consistent with the Maryland Commission's request and our conclusions above in Section IV.C.2. concerning the role state commissions play in the designation of carriers under section 214(e), we dismiss without prejudice Cellco's request for designation of eligible telecommunications carrier status for service provided in Maryland. Although we do not reach the merits of the Cellco request for designation in Delaware in this Order, we conclude that the Delaware Commission's comments in this proceeding provide a sufficient basis for the exercise of our jurisdiction to consider the merits of the request for designation under section 214(e)(6). We discuss each of the requests in greater detail below.

130. *Maryland Request.* At the request of the Maryland Commission, we dismiss Cellco's request for designation as an eligible telecommunications carrier in Maryland. In a letter to the Commission on April 18, 2000, the Maryland Commission stated its intent to assert jurisdiction over CMRS providers, including Cellco, for purposes of making eligible telecommunications carrier designations in Maryland.²⁹⁷ We are not persuaded by Cellco's statement that it has "informally confirmed with the professional staffs of the Maryland and Delaware commissions that these statutory exclusions are complete exclusions from the commissions' jurisdiction."²⁹⁸ We emphasize that carriers seeking a designation from this Commission for service provided on non-tribal lands must provide to us an affirmative statement²⁹⁹ from the state commission or a court of competent jurisdiction that the carrier is not subject to the state commission's jurisdiction for purposes of eligible carrier designation.³⁰⁰

131. We decline Cellco's invitation that we should interpret the relevant state law to conclude that it is not subject to the state commission's jurisdiction. We note that, while Cellco has cited provisions of applicable state law in both Delaware and Maryland to support its contention that the state regulatory commission has no designation authority over wireless carriers, we believe that, as a matter of federal-state comity, such interpretations are better performed by the affected state commissions. As this case demonstrates, in the absence of explicit state guidance in the form of an affirmative statement from the state commission or a court of competent jurisdiction regarding the interpretation of its state law, premature intervention by the Commission may lead to confusion and duplication of efforts with the state commission, and an improper exercise of our jurisdiction under section 214(e)(6).

132. Should Cellco challenge the Maryland Commission's exercise of authority under section 214(e)(2), resolution of the jurisdictional issue may be obtained either through the state commission proceeding or in a judicial proceeding. Should the state commission or courts ultimately determine that Cellco is not subject to the state commission's jurisdiction for purposes of the eligibility designation, the Commission will assume the designation responsibility under section 214(e)(6) upon request. We reiterate our expectation that state commissions will act as expeditiously as possible on requests for designation. Should Cellco submit to the Maryland Commission a request for designation under section

²⁹⁷ Maryland Commission *ex parte* comments at 1-2.

²⁹⁸ Cellco Petition at n. 9.

²⁹⁹ As discussed *supra* in Section IV.C.2., we find that an "affirmative statement" of the state commission may consist of any duly authorized letter, comment, or state commission order indicating that it lacks jurisdiction to perform designations over a particular carrier.

³⁰⁰ See Maryland Commission *ex parte* comments at 2-3 (stating that carriers should seek a ruling from the state commission on the issue of jurisdiction).

214(e)(2), we strongly encourage the Maryland Commission to resolve this request within six months of the filing date.

133. *Delaware Request.* With regard to Cellco's request for designation as an eligible telecommunications carrier for service provided in Delaware, we conclude that the statements contained in comments filed by the Delaware Commission are sufficient to warrant our assertion of jurisdiction under section 214(e)(6). In its comments, the Delaware Commission confirms that the Delaware General Assembly has, for almost two decades, withheld from the Delaware Commission jurisdiction over cellular service or other mobile radio services.³⁰¹ Specifically, the Delaware Commission cites to Delaware law stating that it "shall have no jurisdiction over the operation of telephone service provided by cellular technology or by domestic public land mobile radio service or over the rates to be charged for such service or over property, property rights, equipment or facilities employed in such service."³⁰² According to the Delaware Commission, it has consistently taken the position that it has not been granted regulatory jurisdiction over any aspect of telephone service provided by mobile, and now fixed, cellular wireless technology.³⁰³ The Delaware Commission states that it does not currently exercise any form of supervisory jurisdiction over wireless CMRS providers, including Cellco, and acknowledges that this Commission, not the Delaware Commission, "must be the entity to . . . supervise and enforce the proper application of such support by Cellco."³⁰⁴

134. Consistent with the framework adopted in this Order, we conclude that we have jurisdiction to consider Cellco's request for designation as an eligible telecommunications carrier for services provided in Delaware. As a result, we will address Cellco's Delaware request for designation as an eligible telecommunications carrier within six months from the release date of this Order.

2. Western Wireless Petition For Designation As An Eligible Telecommunications Carrier For Wyoming

135. *Background.* On September 1, 1998 Western Wireless Corporation, a wireless provider, petitioned the Wyoming Public Service Commission (Wyoming Commission) for designation as an eligible telecommunications carrier pursuant to section 214(e)(2) for service provided throughout Wyoming. On August 13, 1999, the Wyoming Commission dismissed Western Wireless' request for designation on the grounds that the Wyoming Telecommunications Act denies the Wyoming Commission the authority for regulating "telecommunications services using . . . cellular technology," except for quality of service.³⁰⁵ The Wyoming Commission interpreted this prohibition as preventing it from designating Western Wireless as an eligible telecommunications carrier because Western Wireless

³⁰¹ Delaware Commission Cellco Petition comments at 2-4.

³⁰² Delaware Commission Cellco Petition comments at 3, *citing* 26 Del. Ann. Code § 202(c), *as amended by* 72 Del. Laws ch. 163 (July 16, 1999).

³⁰³ Delaware Commission Cellco Petition comments at 2-3.

³⁰⁴ Delaware Commission Cellco Petition comments at 6.

³⁰⁵ *The Amended Application of WWC Holding Co., Inc., (Western Wireless) For Authority To Be Designated As An Eligible Telecommunications Carrier*, Order Granting Motion to Dismiss Amended Application, Docket No. 70042-TA-98-1 (Record No. 4432), (Aug. 13, 1999) (*Wyoming Order*) *citing* the Wyoming Telecommunications Act of 1995.

provides services using cellular technology.³⁰⁶

136. On September 29, 1999, Western Wireless filed with the Commission a section 214(e)(6) petition seeking a designation of eligibility to receive federal universal service support for service provided throughout Wyoming.³⁰⁷ Western Wireless contends that the Commission should assume jurisdiction given the Wyoming Commission's determination that it lacked jurisdiction under the applicable state law to designate wireless carriers as eligible telecommunications carriers.³⁰⁸ On November 12, 1999, the Common Carrier Bureau released a Public Notice seeking comment on Western Wireless' petition for designation as an eligible telecommunications carrier.³⁰⁹

137. *Discussion.* Consistent with the framework adopted in this Order, we conclude that we have the authority under section 214(e)(6) to consider this petition. We commend the Wyoming Commission for its resolution of the threshold jurisdictional question, and encourage other state commissions to resolve such issues as expeditiously as possible. As with the Cellco Delaware request, we will promptly decide the merits of Western Wireless' request for designation in Wyoming within six months from the release date of this Order.

3. Western Wireless Petition To Be Designated As An Eligible Telecommunications Carrier For The Crow Reservation In Montana

138. *Background.* On August 4, 1999, Western Wireless, a non-tribally-owned telecommunications carrier, filed with the Commission a petition under section 214(e)(6) seeking a designation of eligibility to receive federal universal service support for a service area comprised of the Crow Reservation in Montana.³¹⁰ Specifically, Western Wireless contends that telecommunications service offered on the Crow Reservation is not subject to the jurisdiction of the state commission.³¹¹ At the time of its filing the section 214(e)(6) petition with this Commission, Western Wireless also had pending before the Montana Public Service Commission (Montana Commission) a request for designation as an eligible telecommunications carrier throughout Montana, including the Crow Reservation.³¹² On September 10, 1999, the Common Carrier Bureau released a Public Notice seeking

³⁰⁶ *Wyoming Order* at 2-4.

³⁰⁷ *Western Wireless Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, September 29, 1999 (Wyoming Petition).

³⁰⁸ *See generally* Wyoming Petition.

³⁰⁹ *Western Wireless Corporation Petitions for Designation as an Eligible Telecommunications Carrier to Provide Services Eligible for Universal Service Support in Wyoming*, Public Notice, CC Docket No. 96-45, DA 99-2511 (rel. Nov. 12, 1999).

³¹⁰ *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service to the Crow Reservation in Montana*, August 4, 1999 (Crow Petition). In addition, Western Wireless requested waivers of certain rules governing the amount and timing of high-cost and low-income support.

³¹¹ Crow Petition at 7-8.

³¹² *Montana PSC Docket No. D98.8.190*. Montana Commission Crow Petition comments at 1.

comment on Western Wireless' section 214(e)(6) petition for designation as an eligible telecommunications carrier for the Crow Reservation.³¹³ In its comments, the Montana Commission asks the Commission to dismiss the section 214(e)(6) petition to allow the Montana Commission to consider the designation request.³¹⁴ On November 3, 1999, Western Wireless filed a notice withdrawing from the Montana Commission its petition for section 214(e)(2) designation as an eligible telecommunications carrier throughout Montana.³¹⁵

139. Discussion. Consistent with the framework we adopt in this Order, we will resolve the threshold question of whether Western Wireless is subject to the jurisdiction of the Montana Commission for purposes of determining eligibility for federal support for services provided on the Crow Reservation. As discussed above in Section IV.C.1., we have concluded that section 214(e)(6) does not provide the Commission with the *per se* authority to designate carriers based solely on the provision of service on tribal lands.³¹⁶ As noted above, determinations as to whether a state commission lacks jurisdiction over carriers serving tribal lands involves a fact-specific inquiry informed by principles of tribal sovereignty, treaties, state law, and federal Indian law. Consistent with the discussion above in Section IV.C.3., we conclude that Western Wireless should bear the burden of demonstrating that it is not subject to the jurisdiction of the Montana Commission for purposes of an eligibility designation for services provided on the Crow Reservation.

140. Consistent with the framework we establish in Section IV.C.3. and to permit Western Wireless a full and fair opportunity to present a case consistent with the guidance we give in this Order, we will reopen the record in this proceeding to allow Western Wireless an opportunity to supplement its claim that the Montana Commission lacks jurisdiction to make the designation for service provided on the Crow Reservation. Western Wireless shall notify the Commission in writing within 15 days of release of this Order whether it wishes to supplement the record consistent with the determinations in this Order. If Western Wireless chooses to supplement the record, it shall do so within 30 days of the date it notifies the Commission of its intent to do so. It shall also provide copies of the supplemental filing to the Montana Commission at the time of its filing with the Commission. In any event, the Commission will release, and publish in the Federal Register, a public notice announcing that the Montana Commission, and any other interested party, shall have 30 days to respond to Western Wireless' original petition and/or supplemental filing. To ensure that the Montana Commission receives prompt notification of the 30-day period, the Commission shall also send to the Montana Commission, by overnight express mail, the public notice announcing the comment cycle deadline. Should the Commission determine, on the basis of the record developed, that the Montana Commission does not have authority to perform the eligibility designation for Western Wireless' service provided on the Crow Reservation, the Commission will exercise its authority under section 214(e)(6) to decide the merits of

³¹³ *Western Wireless Corporation Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Services Eligible for Universal Service Support to Crow Reservation, Montana*, Public Notice, CC Docket No. 96-45, DA 99-1847 (rel. Sept. 10, 1999).

³¹⁴ Montana Commission Crow Petition comments at 2-3 (noting that it has designated carriers serving tribal lands in Montana, including the Crow Reservation).

³¹⁵ See Montana Commission Crow Petition supplemental comments at 1-2

³¹⁶ See, e.g., CTIA Crow Petition comments at 5; Smith Bagley Crow Petition comments at 2; Western Wireless Crow Petition reply comments at 2-3.

the request within six months after release of an order resolving the jurisdictional issue.

4. Smith Bagley Petition To Be Designated As An Eligible Telecommunications Carrier in Arizona and New Mexico

141. Background. On June 2, 1999, Smith Bagley, Inc., a non-tribally-owned CMRS provider, filed a petition seeking designation by the Commission as an eligible telecommunications carrier under section 214(e)(6) for those parts of its service areas in Arizona and New Mexico that encompass federally reserved Indian lands.³¹⁷ In April 1999, Smith Bagley submitted to the Arizona Corporation Commission (Arizona Commission) and the New Mexico Public Regulation Commission (New Mexico Commission) separate requests for designation as an eligible telecommunications carrier pursuant to section 214(e)(2). Both state commissions initiated proceedings to consider the merits of the designation requests, although neither commission has reached a decision at this time. Although Smith Bagley applied to the respective state commissions for designation, Smith Bagley contends in its section 214(e)(6) petition that this Commission should designate Smith Bagley as an eligible telecommunications carrier for all federally reserved Native American lands within its service area.³¹⁸

142. On July 6, 1999, the Common Carrier Bureau released a Public Notice seeking comment on Smith Bagley's petition for designation as an eligible telecommunications carrier in Arizona and New Mexico.³¹⁹ In response, the Arizona Commission asserted that it has jurisdiction over tribal lands served by non-tribally owned telephone companies.³²⁰

143. Discussion. Consistent with the framework we adopt in this Order for the designation of carriers serving tribal lands, we dismiss without prejudice Smith Bagley's section 214(e)(6) request for designation as an eligible telecommunications carrier for tribal lands in Arizona and New Mexico. Both the Arizona and New Mexico Commissions are currently considering section 214(e)(2) requests for designation filed by Smith Bagley prior to the date of their filing with this Commission. As we concluded above in Section IV.C.3., in order to avoid the possibility of forum-shopping and the costs and confusion caused by a duplication of efforts between this Commission and state commissions, we decline to address a designation request under section 214(e)(6) if a request for eligible telecommunications carrier designation is pending at the state commission.

144. Accordingly, we dismiss without prejudice Smith Bagley's request for designation under section 214(e)(6) to permit the Arizona and New Mexico Commissions to complete their proceedings on the merits of Smith Bagley's pending requests. We request, however, that both state commissions act expeditiously in consideration of Smith Bagley's designation requests. We note that those requests have now been pending for over one year. As we have discussed above, we are concerned that unreasonable delays in acting upon designation requests will hinder the availability of affordable telecommunications

³¹⁷ *Smith Bagley, Inc. Petition for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(6)*, June 2, 1999 (Smith Bagley Petition)

³¹⁸ Smith Bagley Petition at 5.

³¹⁹ *Petition of Smith Bagley, Inc. for Designation as an Eligible Telecommunications Carrier*, Public Notice, CC Docket No. 96-45, DA 99-1331 (rel. July 6, 1999).

³²⁰ Letter from Maureen A. Scott, Arizona Corporation Commission, to Magalie Roman Salas, FCC, dated July 27, 1999 (Arizona Commission comments) at 1.

services in high-cost areas. We therefore strongly encourage the Arizona and New Mexico Commissions to resolve Smith Bagley's pending requests for designation as soon as possible.

5. Cheyenne River Sioux Tribe Telephone Authority Petition For Designation As An Eligible Telecommunications Carrier

145. *Background.* The Cheyenne River Sioux Tribe Telephone Authority (Cheyenne Telephone Authority), a tribally-owned carrier, provides service within the Cheyenne River Indian Reservation.³²¹ According to the Cheyenne Telephone Authority, the South Dakota Public Utilities Commission (South Dakota Commission) lacks authority over tribal enterprises conducting business on the Cheyenne River Sioux Reservation, such as the Cheyenne Telephone Authority.³²² Accordingly, the Cheyenne River Sioux Tribe designated the Cheyenne Telephone Authority as an eligible telecommunications carrier serving the reservation.³²³

146. As a precautionary measure to avoid the serious consequences of failing to be eligible to receive federal universal service support as of January 1, 1998, the Cheyenne Telephone Authority also applied to the South Dakota Commission for eligible telecommunications carrier designation.³²⁴ In so doing, the Cheyenne Telephone Authority expressly stated its belief that the South Dakota Commission did not have jurisdiction within reservation boundaries, but that it applied to the South Dakota Commission in any event because of the ambiguous nature of the Act, which at that time did not contain section 214(e)(6).³²⁵ On December 11, 1997, the South Dakota Commission found that the Cheyenne Telephone Authority satisfied the requirements for designation as an eligible telecommunications carrier for its service area.³²⁶

147. On December 1, 1997, Congress enacted section 214(e)(6), giving the Commission jurisdiction to perform eligible telecommunications carrier designations for carriers not subject to the jurisdiction of a state commission. On January 7, 1998, the Cheyenne Telephone Authority filed a petition with the Commission seeking designation as an eligible telecommunications carrier under

³²¹ *Petition of the Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, January 7, 1998 (Cheyenne Telephone Authority Petition) at 5.

³²² Cheyenne Telephone Authority Petition at 5. The Cheyenne River Sioux Tribe and South Dakota Commission have engaged in a lengthy dispute regarding the South Dakota Commission's authority to regulate activities on tribal land. See *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 595 N.W. 2d 604 (S.D. 1999) (concluding that the South Dakota Commission's exercise of authority to regulate sale of telephone exchanges on tribal land was not preempted by federal law).

³²³ Cheyenne Telephone Authority Petition at 7 citing Cheyenne River Sioux Tribe Resolution No. 337-97-CR (Nov. 5, 1997).

³²⁴ Cheyenne Telephone Authority Petition at 7.

³²⁵ Cheyenne Telephone Authority Petition at 7-8.

³²⁶ Cheyenne Telephone Authority Petition at 8 citing *Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order*, In the Matter of the Filing by Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier, No. TC97-184 (Dec. 17, 1997).

section 214(e)(6) and confirmation of the designation performed by the South Dakota Commission.³²⁷ On January 28, 1998, the Common Carrier Bureau released a Public Notice seeking comment on the Cheyenne Telephone Authority petition.³²⁸ On August 25, 1998, the South Dakota Commission submitted a letter asserting that "it has jurisdiction to designate [Cheyenne Telephone Authority] as an eligible telecommunications carrier for its presently served service area."³²⁹

148. Although the Cheyenne Telephone Authority received its eligible telecommunications carrier designation from the South Dakota Commission pursuant to section 214(e)(2), it requests designation from this Commission due to its concern that the state commission may lack jurisdiction over tribally-owned carriers to make the eligible telecommunications carrier designation.³³⁰ Alternatively, the Cheyenne Telephone Authority asks the Commission to confirm the state commission's designation to ensure that its eligibility status is preserved in the event the matter is reopened and a determination made that the South Dakota Commission does not have jurisdiction within the boundaries of the Cheyenne River Indian Reservation.³³¹

149. *Discussion.* In accordance with our conclusion above that section 214(e)(6) requires the Commission to designate an eligible telecommunications carrier only when the state lacks jurisdiction under section 214(e)(2), we dismiss Cheyenne Telephone Authority's petition without prejudice. We find no reason before us to disturb the South Dakota Commission's designation of the Cheyenne Telephone Authority as an eligible telecommunications carrier.³³² In addition, we note that this conclusion is consistent with our prior statement that, "[a]ny carrier that is able to be or has already been designated as an eligible telecommunications carrier by a state commission is not required to receive such designation from the Commission."³³³

150. In reaching this conclusion we note that, as with the case of the Cheyenne Telephone Authority, many tribes may have ongoing jurisdictional disputes with state commissions. We are hopeful that our decision not to disturb the finding of the state commission in this instance will encourage state commissions and tribes to move forward with the designation process for determining eligibility for federal universal service support despite disagreements relating to the state's exercise of jurisdiction over carriers providing service on tribal lands. We believe that to disturb a state

³²⁷ See Cheyenne Telephone Authority Petition.

³²⁸ *Cheyenne River Sioux Tribe Telephone Authority Seeks FCC Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, AAD/USB File No. 98-21, DA 98-150 (rel. Jan. 28, 1998).

³²⁹ Letter from Rolayne Ailts West, South Dakota PUC, to Magalie Roman Salas, FCC, dated August 25, 1998.

³³⁰ According to the Cheyenne Tribal Authority, it submitted its request for designation to the South Dakota Commission prior to the adoption of section 214(e)(6) in order to continue to receive support after the eligibility requirements of the Act came into effect. Cheyenne Telephone Authority Petition at 7-8.

³³¹ Letter from James A. Casey, on behalf of the Cheyenne River Sioux Tribe Telephone Authority, to Magalie Roman Salas, FCC, dated August 23, 1999.

³³² See, e.g., *Universal Service Order*, 12 FCC Rcd 8859, para. 147.

³³³ *Section 214(e)(6) Public Notice* at 1.

commission's prior determination that a particular carrier is eligible for federal universal service support would have the unintended effect of forcing the tribal authority to choose between delaying its designation request pending a lengthy resolution of disputed jurisdictional issues or conceding jurisdiction to the state commission for other purposes in order to be eligible for federal universal service support.

V. FURTHER NOTICE OF PROPOSED RULEMAKING

151. *Deadline for Resolving Section 214(e) Designation Requests.* In this Further Notice of Proposed Rulemaking, we seek comment on the imposition of a time limit during which requests for designation as an eligible telecommunications carrier under section 214(e), filed either with this Commission or a state commission, must be resolved. As noted above, we are concerned that lengthy delays in addressing requests for designation may hinder the availability of affordable telecommunications services in many high-cost areas of the Nation. We believe it is unreasonable to expect a prospective entrant to enter a high-cost market and provide service in competition with an incumbent carrier that is receiving support, without knowing whether it is eligible to receive support. If new entrants do not have the same opportunity to receive universal service support as the incumbent, such carriers may be unable to provide service and compete with the incumbent in high-cost areas.³³⁴ As the Commission has previously concluded, competitively neutral access to such support is critical to ensuring that all Americans, including those that live in high-cost areas, have access to affordable telecommunications services.³³⁵ We believe such a result to be contrary to Congress' intent in adopting section 254 of the Act.

152. We therefore seek comment on whether to adopt a rule that would require resolution of the merits of any request for designation under section 214(e) within a six-month period, or some shorter period. In addition, we seek comment on whether to require a similar time limit for the resolution of the jurisdictional issues associated with requests for eligibility designations on tribal lands, and what that time limit should be. We intend to consult with members of the Joint Board on this issue and invite comment from the Joint Board and interested parties. We also seek comment on the Commission's authority to enforce any such requirement imposed on state commissions. For example, we seek comment on our authority under sections 201(b), 253, 254 of the Act,³³⁶ or *AT&T v. Iowa Utilities Board*³³⁷ to enforce any deadline imposed on resolution of requests for eligibility designations under section 214(e).

³³⁴ The Commission has recognized the importance of competitively neutral support mechanisms between competitive entrants and incumbent carriers in promoting competition and the provision of service in high-cost areas. *Universal Service Order*, 12 FCC Rcd at 8932, para. 287.

³³⁵ *Universal Service Order*, 12 FCC Rcd at 8801, para. 48 (agreeing with the Joint Board that an explicit recognition of competitive neutrality in the collection and distribution of funds and determination of *eligibility* in universal service support mechanisms is consistent with congressional intent and necessary to promote a pro-competitive, de-regulatory national policy framework) (emphasis added).

³³⁶ 47 U.S.C. § 201(b) (allowing the Commission to prescribe such rules as may be necessary in the public interest to carry out the provisions of the Act); 47 U.S.C. § 253 (removal of barriers to entry); 47 U.S.C. § 254 (preserve and advance universal service).

³³⁷ *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999).

153. Alternative Frameworks for Resolving Designation Requests. In light of the immediate need for expeditious resolution of designation requests from carriers serving tribal lands, we have adopted a framework for resolving designation requests filed at the Commission under section 214(e)(6). This framework is designed to streamline the process for designation of eligible telecommunications carriers serving tribal lands in order to expedite the availability of affordable telecommunications services to tribal communities. We are guided, however, by our desire to work cooperatively with the state commissions and tribal authorities to consider alternative methods for facilitating the expeditious resolution of eligibility designation requests. We therefore seek comment on additional ways in which the state commissions, tribal authorities, and this Commission can work together toward this end. We look forward to collaborating further with state commissions and tribal leaders to consider additional measures we can take to resolve eligibility designation requests on tribal lands as expeditiously as possible.

VI. PROCEDURAL MATTERS

A. Paperwork Reduction Act

154. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA) and found to impose new or modified reporting and/or recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and/or recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the PRA, and will go into effect upon announcement in the Federal Register of OMB approval.

B. Final Regulatory Flexibility Analysis

155. As required by the Regulatory Flexibility Act (RFA),³³⁸ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Further Notice*.³³⁹ The Commission sought written public comment on the proposals in the *Further Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³⁴⁰

1. Need for and Objectives of this Report and Order and the Rules Adopted Herein

156. The Commission issues this Twelfth Report and Order (Order) as a part of its implementation of the Act's mandate that "[c]onsumers in all regions of the Nation . . . have access to telecommunications and information services . . .".³⁴¹ This Order implements that mandate by enhancing Lifeline and LinkUp support for low-income individuals living on tribal lands, as defined herein. This Order also outlines the process the Commission will follow in designating

³³⁸ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104- 121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

³³⁹ See *Further Notice*, 14 FCC Rcd at 21270-21282.

³⁴⁰ See 5 U.S.C. § 604.

³⁴¹ 47 U.S.C. § 254.